STATE OF MICHIGAN

COURT OF APPEALS

LAURA SAWYER,

Plaintiff-Appellant,

v

WEST FLINT VILLAGE LONG TERM CARE CORP., d/b/a HEARTLAND MANOR,

Defendant-Appellee.

UNPUBLISHED
October 23, 2001

No. 226186
Genesee Circuit Court
LC No. 98-063845-CL

Before: Zahra, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition of her claim under the Whistleblowers' Protection Act, MCL 15.361 *et seq*., pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff is a licensed practical nurse. In the course of her employment with defendant, plaintiff was assigned to care for a resident infected with Methicillin-Resistant Staph Aureus (MRSA). Plaintiff was concerned that exposure to airborne pathogens from the MRSA posed a health hazard, particularly because the resident's room contained an oscillating fan and the door to the room was kept open. When plaintiff closed the door, she was advised to keep the door open by defendant's administrator, Marilyn Tuoriniemi.

On May 7, 1998, plaintiff reported her concerns to the Michigan Department of Consumer and Industry Service, Bureau of Safety and Regulation, Occupational Health Division (DCIS). Plaintiff believed that the conditions violated Michigan Occupational Safety and Health Administration standards. Ultimately, the DCIS was satisfied that the alleged conditions did not pose a health risk.

Plaintiff told two employees, Lamantha Richardson and Michael Wilson, that she was the person who complained to the DCIS, but she did not inform Tuoriniemi. Tuoriniemi questioned Richardson and Wilson regarding the identity of the person who had made the report. On June 22, 1998, defendant terminated plaintiff's employment. The stated reasons for plaintiff's discharge were her failure to complete a job assignment, failure to document treatment, insubordination, and resident neglect.

Plaintiff brought this action alleging that defendant discharged her in retaliation for her report to the DCIS in violation of the Whistleblowers' Protection Act, MCL 15.361 *et seq*., (WPA). Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). Defendant argued that plaintiff could not establish a causal link between the protected activity and her discharge because she could not establish that defendant knew she was the person who complained to the DCIS. Defendant relied on plaintiff's deposition testimony that she did not tell Tuoriniemi that she had reported to the DCIS as well as Tuoriniemi's deposition testimony that she did not learn about plaintiff's report until after plaintiff was discharged. In opposition, plaintiff offered the affidavits of Richardson and Wilson, stating that Tuoriniemi questioned them about who had contacted the DCIS. Following a hearing on the motion, the trial court determined that plaintiff failed to show a genuine issue of material fact regarding whether defendant had notice of plaintiff's report to the DCIS, and therefore could not establish the requisite causal link between the protected activity and her discharge. The court granted summary disposition in favor of defendant.

A trial court's determination whether evidence establishes a prima facie case under the WPA is a question of law that we review de novo. *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 278; 608 NW2d 525 (2000). A motion brought pursuant to MCR 2.116(C)(10) "is properly granted if the documentary evidence presented shows that there is no genuine issue with respect to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Michalski v Reuven Bar Levav*, 463 Mich 723, 729-730; 625 NW2d 754 (2001). "In reviewing a motion for summary disposition under MCR 2.116(C)(10), the court considers the pleadings, affidavits, and other documentary evidence filed in the action or submitted by the parties in the light most favorable to the nonmoving party." *Id.* The party opposing the motion "may not rely on mere allegations or denials in its pleadings, but must set forth specific facts through affidavits or other permitted evidence to demonstrate that there exists a genuine issue for trial." *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322, 324-325; 559 NW2d 86 (1996). MCR 2.116(G)(4).

The WPA makes it unlawful for an employer to retaliate against an employee who reports violations of the law. *Anzaldua v Band*, 457 Mich 530, 534; 578 NW2d 306 (1998). In order to establish a prima facie case of retaliatory discharge under the WPA, a plaintiff must establish that "(1) the plaintiff was engaged in a protected activity as defined by the act, (2) the plaintiff was subsequently discharged, and (3) there existed a causal connection between the protected activity and the discharge." *Roberson, supra* at 325.

We address plaintiff's second argument on appeal first. Plaintiff argues that the trial court erred as a matter of law by requiring her to show that defendant had notice of her complaint to the DCIS. We disagree. "[A]n employer is entitled to objective notice of a report or a threat to report by the whistleblower." *Roberson*, *supra* at 326, 329; *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 257; 503 NW2d 728 (1993). This Court has determined that a failure to show knowledge of the protected activity on the part of the employer defeats causation. *Roberson, supra*.

With respect to the merits of plaintiff's claim, we conclude that the trial court properly granted summary disposition. Plaintiff stated that she did not tell Tuoriniemi that she reported to the DCIS, nor did Tuoriniemi ever indicate to plaintiff that she was aware of that fact. Tuoriniemi denied having knowledge that plaintiff was the person who complained. Plaintiff's

evidence that Tuoriniemi made inquiries is insufficient to create a question of fact that she ultimately ascertained the identity of the person who complained. The evidence offered by plaintiff does not create a genuine issue of material fact on the element of causation.

We reject plaintiff's reliance on her deposition testimony regarding a statement by Joanne Williams, a certified nurse assistant, to plaintiff that "Marilyn knows you did it." This testimony is inadmissible hearsay and therefore not properly considered in opposition to defendant's motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 125; 597 NW2d 817 (1999); MRE 801(c); MRE 802. Plaintiff did not offer an affidavit or testimony from Williams to support her claim that Tuoriniemi knew plaintiff had reported to the DCIS. MCR 2.116(G)(4). Viewing the evidence in the light most favorable to plaintiff, we conclude that plaintiff failed to demonstrate facts to permit the inference of a causal connection between her report to the DCIS and defendant's termination of her employment.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael R. Smolenski
/s/ Michael J. Talbot